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IN THE

Supreme Court of the United States

October Term 1974

Nos. 74-1131, 74-1132

KALAMAZOO BOARD OF EDUCATION,
Petitioner,

MICHIGAN STATE BOARD OF EDUCATION,
Petitioner,

v.

MICHELLE OLIVER, *et al.*,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit, affirming the District Court's finding of *de jure* segregation and the District Court's granting a permanent injunction, is reported at 508 F.2d 178 (6th Cir. 1974). The District Court's decision is reported at 368 F. Supp. 143 (W.D Mich. 1973). Ancillary reported decisions include 346 F. Supp. 766 (W.D. Mich. 1971) (preliminary injunction), *aff'd*, 448 F.2d 635 (6th Cir. 1971). Ancillary unreported decisions include the District Court's denial of a motion to recuse (A. 124) and the Court of Appeals' order denying a writ of mandamus or prohibition seeking recusal (A. 150).

Jurisdiction

The judgment of the Court of Appeals was rendered on December 9, 1974. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the courts below, in holding that the Kalamazoo school district was segregated *de jure*, correctly adopted and applied the legal standards governing *de jure* segregation established by this Court.

2. Whether the courts below accorded procedural due process to the defendant city board of education.

3. Whether the courts below were warranted in including state defendants in the final decree.

Statement

This is a school desegregation action against the Board of Education of Kalamazoo, Michigan.[1] The District Court held that the school system was segregated *de jure*. This holding was based upon extensive findings concerning the school board's actions with respect to assignment of faculty and staff (A. 204-05), construction and location of new schools (A. 185-95, 197-98, 203-04, 207-08), expansion and abandonment of existing schools (A. 196, 198), deployment of portable classrooms (A. 184, 195-97, 198), location of school-attendance boundary lines (A. 179-80, 183-85, 189-90, 207, 208), and the use of optional or dual zones (A. 183-85). The Court of Appeals concluded that "the finding of

[1] The state board of education, which as to some matters supervises and as to others cooperates with the city school board, is also named as a party defendant.

purposeful segregation by public action and inaction not only is not clearly erroneous but is fully supported by the record" (A. 294, 508 F.2d at 183). On the question of relief, the District Court embodied in its decrees a desegregation plan devised by administrators of the Kalamazoo school system and adopted by the Kalamazoo Board of Education (see A. 231-38). (That approval was rescinded by a reconstituted Board shortly before the opening of the schools for the 1971-1972 school year.) The school system has been operating on a fully desegregated basis pursuant to the Board's plan for four years.

The city Board of Education here avers that it was denied procedural due process by the courts below. That claim is principally based on an incident in which the District Court expressed concern about possible impropriety in deposing as adverse witnesses two former school board members by attorneys who had represented the Board while its membership included those individuals. The court's concern resulted in a delay in taking the depositions; the depositions were however finally taken, without restriction as to scope, by a co-counsel who had not previously represented the school board. He had been retained by the board from the outset of the litigation (see A. 28).

The state petitioners here claim that the courts below erred in including them as addressees of the final decree.

Argument

1. In determining whether the school system was segregated *de jure*, the courts below correctly adopted and carefully applied the principles set forth by this Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973). Instances of virtually all of the indicia of a

school system purposefully segregated by race, as set forth in *Swann* and *Keyes,* are contained in the findings below. Those findings are amply supported by the voluminous record in this case.

For example, the District Court found that black teachers were assigned in disproportionate numbers to black schools. (Of thirty black elementary school teachers employed in 1970, twenty-nine were assigned to the five schools having the greatest enrollment of black students; and they were assigned among those schools in rough proportion to the degree of black student concentration, A. 204-05). As this Court stated in *Swann,* "where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers . . . a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." 401 U.S. at 18.

As to student assignment, the District Court found that students had been purposefully segregated by a variety of official actions. Those actions are essentially indicative of a policy of containing minority race within certain schools thereby excluding black children from other schools on account of race. The record documents that, while attendance-zone changes were frequently made, boundary lines defining the attendance areas of identifiably black schools were maintained with unsual rigidity. Portable and permanent classrooms were added to certain schools despite the availability of unused space in adjacent schools serving the other race. Optional or dual zones were created in some racially mixed areas with the effect of allowing white students to opt out of a school having a substantial black enrollment. New schools were constructed in areas of white suburban expansion producing increased racial segregation. Accordingly, the Court of Appeals held

that "the attendance zoning policy of the Kalamazoo Board . . . encouraged and perpetuated segregation in the public schools"; that "the Board's school construction and siting policies furthered and solidified Kalamazoo public school segregation"; and that "school board policies and actions served to create and strengthen the racial identifiability of certain schools as 'Black' and thereby to further and perpetuate a dual school system in Kalamazoo" (A. 295, 296, 297; 508 F.2d at 184, 185). The standards adopted and applied by the courts below reflect firm adherence to the decisions of this Court. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 401 U.S. 1, 18, 20-21 (1971); *Keyes* v. *School District No. 1*, 413 U.S. 189, 192, 198-99, 201-02 (1973); *Bradley* v. *Milliken*, —— U.S. ——, 94 S. Ct. 3112, 3117-18, 3127 (1974).

No complaint is made of excessive or inappropriate remedy nor, indeed, could there be. The remedy consists of a desegregation plan prepared for and adopted (albeit later rescinded) by the Kalamazoo Board of Education. Cross-district busing is not involved.

2. Both courts below gave full consideration to the petitioner's allegations of bias. (The Michigan state petitioners do not join in this claim.) Applying the principles announced by this Court in *Berger* v. *United States*, 255 U.S. 22 (1921), the Court of Appeals held that petitioner's "allegations do not suffice to support a claim of personal bias or prejudice on the part of the District Judge." This holding is consistent with the decisions of other lower courts respecting claims of trial court bias in the context of school desegregation. See *Plaquemines Parish School Board* v. *United States*, 415 F.2d 817, 824-25 (5th Cir. 1969); *Sendak* v. *Dillin, petition for certiorari denied*, 412 U.S. 949 (1973). We are unable to appreciate any merit

in petitioner's effort to convert its assignments of error into either a claim of bias or a denial of due process. Indeed, the thrust of petitioner's attack would extend to the Court of Appeals in view of its decision of affirmance.

3. In addition to specific findings in this case on the role of Michigan state agencies in effecting school segregation, the Court of Appeals has more fully set forth the 'substantial control of Michigan state officials over local schools operations" in *Bradley* v. *Milliken*, 484 F.2d 215, 238-41 (6th Cir. 1973), *rev'd on other grounds*, —— U.S. ——, 94 S. Ct. 3112 (1974). See 94 S. Ct. at 3140 & n. 5. The lower courts which have reached the question have agreed that state officials may appropriately be included among the addresses of a school-desegregation injunction. See *United States* v. *Texas Education Agency*, 321 F. Supp. 1043 (E. D. Tex. 1970), *aff'd as modified*, 447 F.2d 441 (5th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1971); *United States* v. *Georgia*, C.A. No. 12, 972 (N.D. Ga., Dec. 17, 1970) (en banc). See also *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458 (N.D. Ala. 1967) (3-judge court), *aff'd sub nom. Wallace* v. *United States*, 389 U.S. 215 (1967). The decree here merely directs the state officials to cooperate with the local school board in fulfilling its constitutional obligation to operate a unitary school system.

CONCLUSION

For the foregoing reasons the petitions for Writs of certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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